IN RE AUGUR.*

MEMORANDUM OF DECISION.

This is an application to admit to probate what is claimed to be a substantial copy of the will of Harriet M. Augur, the original will not being produced in court, but evidence being offered to show that such a will had been legally executed, but that it had been either lost or fraudulently destroyed.

The only evidence offered by the contestant was a copy of a writ and complaint, dated May 13, 1899, claiming an injunction, in an action brought by the proponent and others in the Superior Court against the contestant and others, admitted by the proponent to be a true copy of the original. The allegations of this complaint were

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*Decided in the Probate Court for the District of New Haven, Connecticut, March 13, 1900.

This case is interesting for the reason that it deals with substantially a new point of law, i. e., the legal effect of evidence showing that a lost will was last known to have been in the possession of another than the testator. Practically all the cases deal with the presumption of revocation arising where a lost will was last known to have been in the possession of the testator. In the very few cases where the lost will was out of the testator's possession, it is generally clearly shown that the will was so entirely out of the testator's possession that he could not destroy it animo revocandi, and remained so until his death. In none of the cases does the court carefully consider the question of the legal effect of proving that a lost will was last known to be in the possession of another than the maker, and in none of them do the counsel appear to discuss it. (See the cases cited in the body of the opinion.)

As might be inferred from the opinion the counsel for the proponent at the trial of the case claimed that the rule of law was as stated in Jarman on Wills I *133, Woerner's American Law of Administration I, *91, Greenleaf on Evidence II, §681 and Thornton on Lost Wills, §64.

These authorities state the rule to be that: If a will once executed is not found at its maker's death it is presumed revoked, "but that if the will is traced out of the deceased's custody it is incumbent on the party asserting the revocation to prove that the will came again into such custody or was destroyed by his direction" (Jarman as cited).

On this point Jarman cites *Colvin v. Fraser*, *2 Hagg. Eccl. Rep. 327*; *Wynn v. Heveningham*, *1 Coll. 638, 639*. Greenleaf cites Jarman, *Minkler v. Minkler*, *14 Vt. 245*; *Helyar v. Helyar*, *1 Lee 472*; *Lillie v. Lillie*, *3 Hagg. 184*; *Loxley* v. *Jackson*, *3 Phillim 126*, and *Jackson v. Betts*, *9 Cowen 208*. Woerner and Thornton apparently rely on the case of *Dawson v. Smith*, *3 Houst. (Del.) 335*.

Jarman's citation of *Colvin v. Fraser* on this point would seem to be due to a note to the case of *Lillie v. Lillie* in the 3rd of Haggard, which states the law in this way and gives *Colvin v. Fraser* as authority.

based on information furnished by the proponent and were verified by his oath.

The testatrix died August 28, 1898, leaving as her next of kin, her son, Jacob Heitman Augur, who died in March, 1899. Jacob P. Augur, the husband of Harriet M. Augur, and the father of Jacob Heitman Augur, died in 1879, leaving a will by which he gave to this son, his only child, one hundred dollars, and all the residue of his estate to his wife.

The proponent is a nephew of Jacob P. Augur, and a beneficiary under the alleged lost will of Harriet M. Augur, and the contestant is Marie E. Augur, widow and legatee of Jacob Heitman Augur.

It appears from the evidence of ex-Judge Lucius P. Deming, a practicing attorney, that in 1882 he was requested to draw a will for Mrs. Augur. He produced in court a pencil memorandum,

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In that case the will was known to have been for nine years before he died in the testator's possession. In *Wynn vs. Heveningham* the will was found mutilated, and having been proved at all times to have been in the hands of a custodian, it was found by the court not the work of the testator. The other cases cited by Jarman, Woerner, Greenleaf, and Thornton will all be found to have been decided on another point except *Dawson v. Smith.* This, as indicated in the opinion above, is merely a charge to a jury, and the judge says the whole matter is a question of fact. Thus it is seen that the exception to the rule as stated has a very slender foundation in authority. Much apparently has been inferred from the statement that the presumption of revocation arises where the will has been "*traced into the testator's possession.*" The opinion shows that in its bald form it cannot be correct.

The main rule or presumption as stated in the opinion and by Chancellor Walworth in the case of *Betts v. Jackson, 6 Wend. 173* has its foundation in experience which teaches that the absence of a will is presumptive evidence of its revocation. This presumption, however, may be overcome by showing in any of a variety of ways that it is improbable that the will was revoked. This may be done by showing that the will was destroyed without the testator's knowledge (*Brown* v. *Brown*, 10 Yerg. 84), by showing that the testator's circumstances did not change after the making of the will, and that he seemed satisfied with the disposition he had made of his property. *Legarre v. Ashe, 1 Bay (S. C.) 464; McBeth v. McBeth, 11 Ala. 596; Foster's Appeal, 87 Pa. St. 67; In re Page 118, Ill., 576; Sugden v. Lord St. Leonards L. R. 1 P. D. 154; Southworth v. Adams Fed. Cas. No. 13,194; In re Steineke's Will, 70 N. W. 59 (Wis.); In re Lambie's Estate, 56 N. W. 223; Behrens v. Behrens, 47 Ohio St. 343; Collagan v. Burns, 57 Me. 449; Scroggins v. Turner, 98 N. C. 135; Eckersley v. Pratt L.R., 1 P.D. 281; Minkler v. Minkler ut sup.*; by showing that it was out of the testator's possession and that he could not destroy it (see cases cited in the opinion); and finally by showing generally that the probability is that the will was not revoked (see cases above cited and *Welch v. Phillips, 1 Moore P. C. 299*). In effect the rule might be stated that the will is presumed revoked unless satisfactorily accounted for, or unless it is shown in some other way that the probability is it wasn't destroyed by the testator.

made by him at Mrs. Augur's residence, at her dictation, the day before the execution of the will.

He testified with particularity as to the execution of the will, and that the paper recently drawn by him, at the suggestion of the attorneys for the proponent, was merely an amplification, in the form usually employed in drawing wills, of the language more tersely but less technically expressed in the memorandum itself.

He testified that the will, when executed, was placed in an envelope endorsed "Will of Harriet M. Augur;" that it was handed by him to the testatrix, and by her to Mr. Willett Hemingway, one of the witnesses to the will; that he has never seen it since, but that he recently found this memorandum among his papers in unsuccessfully searching for a copy of the will, it being his custom to preserve copies of wills drawn by him. The memorandum reads as follows:

The famous case of *Sugden v. Lord St. Leonards ut sup.* amounts to this. See also the opinion in *Southworth v. Adams ut sup.*

The effect of the presumption is this: if there is no evidence to the contrary, the absence of the will establishes a prima facie case that it was destroyed *animo revocandi*; if there is evidence to the contrary, then the presumption is a page from the experience of the judges to be borne in mind by the trier in weighing the evidence (see Thayer, *Evidence at the Common Law* pp. 336, 346).

If this is the true scope of the presumption the exception cannot be correctly stated by these text-books. It would then be stronger than the rule. If it is not true that in all cases, under all circumstances, the absence of the will throws on the proponents the duty of showing the existence of the will at the testator's death, or its destruction without his knowledge and consent before his death, it cannot be true that merely to trace the will out of the testator's possession is enough to throw on the contestants the duty of showing its destruction by the testator or that it came again into his possession. In many cases as in the present, the tracing of the will into the possession of another might not raise any probability that the testator never got it again or that he did not revoke it. The custodian might be in daily intercourse with the testator, and other facts might develop which on the proponents' own evidence would so counteract the effects of the testimony as not to leave it weight enough to rebut the main presumption.

Moreover, any rule as to the effect of such evidence would seem needless. It needs no experience in dealing with wills to appreciate its weight. If a testator couldn't get at his will, he couldn't destroy it. That is common sense. Law on the subject is unnecessary.

The only case really out of harmony with the law as above stated is the case of *Sprigge v. Sprigge L. R., 1 P. D. 608*, where it is held that if the maker of a will becomes insane before death, and at his death a will known to have been made by him cannot be found, those contesting its probate must show its destruction while he was sane. This would seem inconsistent with the trend of the law and a broader statement than the case requires. It is easy to imagine cases in which its application would work hardship.—*Eds.*

"Will Harriet M. Augur Willet Hemingway Executor Pay all debts &c. Give Mary Augur Lane $1000. in consideration of services. Give Hattie Mariah Augur Hollister $1000. for name. Give F. H. U. Cemetery $200. Give Jacob Hiteman Augur, son, $10,000. In case his death give to Maria F. Augur, his wife. If both dead to children, if any. All rest of estate give & bequeath to brothers & sisters of husband Jacob P. Augur, by both wives, if any dead give portion to children of deceased if any Brothers & sisters & ½ brother and sisters to share alike."

I find from the evidence that Harriet M. Augur did legally execute a will in 1882, and that the memorandum itself, rather than the recently prepared so-called "copy," contains the substance of that will. It is claimed that this will was in existence at the death of Mrs. Augur, if not destroyed without her knowledge or consent before her death, and that it should now be established, proof of its contents having been produced. The vital question is: Was the will revoked by the testatrix before her death?

The mere absence of a will raises a presumption that it is revoked. In re Johnson's Will, 40 Conn. 587; Colvin v. Fraser, 2 Hagg. 266; Betts v. Jackson, 6 Wendell 173; Newell v. Homer, 120 Mass. 277; Rice's American Probate Law 248.

This presumption, however, is a presumption of fact rebuttable by evidence. But it is claimed that the presumption of destruction *animo revocandi* does not arise in this case because it is claimed that the deceased did not have ready access to her will, since by the evidence that the will was handed by her to Willett Hemingway immediately after it was executed, it has been "traced out of her possession."

While many cases are authority for the proposition that a will once executed, but not found at death, is presumed to have been revoked, if the testator had ready access to it, there are few decisions to support the bare proposition that no such presumption arises where the will was simply not in the possession of the testator.

Thornton in his work on Lost Wills, Sec. 64, prefers to state the law as follows: "It is the prevailing rule that if the will is not forthcoming at the death of the testator its revocation will be presumed, whether it was in his personal possession or in the possession of another; but in the latter instance the presumption is quite a weak one."

The early English cases referred to in some of the text books, as authority for the proposition that the burden of proof shifts to the

contestants to show revocation where the will is "shown out of the possession of the testator" or "traced out of the testator's possession," are at best but dicta. The American authority apparently relied on being Dawson v. Smith, 3 Houston (Del.) 335, which is not the opinion of a court of last resort, but merely the charge of a judge to a jury in a lower court.

This statement of the rule that the burden of proof shifts cannot be correct if the expressions "shown out of the possession of the testator" or "traced out of the testator's possession" are used merely in the sense of not being in his manual possession. It becomes important, therefore, to inquire what is meant by thus "tracing the will out of his possession." In the absence of direct authority on this point we must resort to the reason for the rule to guide in its construction. The ordinary presumption of the continued existence of that once found to exist, could not with safety be applied to the case of a will not found upon the death of the maker of it.

It is ordinary experience that wills, the legal execution of which necessarily involves more or less publicity, are frequently destroyed in secret, and but for the presumption of revocation which the law wisely raises, wills, in fact revoked, would often be admitted to probate, the intention of the maker being thwarted because of the comparative ease of proving that a will once existed and the corresponding difficulty of showing its secret revocation.

There can be no good reason why the same presumption should not arise even when the will is shown not to have been in the possession of the testator, provided he could have had access to it at any time. But if it be shown that the will was so deposited in the custody of another that the testator could not have had an opportunity to destroy it without the knowledge of the custodian, and if it appears that, so far as he knows, the testator did not secure access to his will before his death, there is every reason, in such a case, why this presumption of revocation should not arise, and why the burden of proof should be on the contestant to show that the will was revoked by the testator.

In most of the cases where it is held on this ground that the presumption of revocation is overcome, it appeared from the evidence, generally from the testimony of the custodian of the will, that the testator had not, and could not have had, access to it. Hildreth v. Schillinger, 2 Stockton (N. J.) 196; Tynan v. Paschal, 27 Texas 286 (84 American Decisions 619); Schultz v. Schultz, 35 N. Y. 653, 655; In re Page, 118 Illinois 576.

Not only has no proof been offered to show that Mrs. Augur did not at all times have ready access to her will, but having, as she did, intimate business relations with Mr. Willett Hemingway, the executor of her husband's will, it cannot, in the absence of any evidence to that effect, be presumed that she did not have access to her will during Mr. Hemingway's life, and if it was still in his custody at the time of his death, which occurred several years before her own, that she did not then take it into her own possession. Even the proponent himself must have assumed that she did take it into her possession, for it does not appear from the evidence that he thought that there was any occasion, before attempting to probate the will as a lost will, to seek out Willett Hemingway's personal representatives and through them to search for it among Willett Hemingway's papers.

Unless this view is taken, the evidence introduced by the proponent to show that all the papers of Mrs. Augur were kept in her safe deposit box in the Second National Bank, to which box they claimed that Jacob Heitman Augur had access, and their intimation that the will was in that box until destroyed, as they suggest by him, is meaningless. Moreover, in the fifteenth paragraph of the sworn complaint in the injunction case, before referred to, it is alleged by the proponent himself that the last will and testament of Harriet M. Augur was in her possession prior to her decease.

As far as appears, then, Mrs. Augur had "ready access," within the meaning of the law, to her will while it was in the possession of Willett Hemingway, and thereafter it is not traced out of her possession and control, whether she kept it in her own house or in her safe deposit box in the Second National Bank, and, therefore, in accordance with the authorities cited, the mere absence of the will at her death raises a presumption of its revocation. But the proponent claims that even if the presumption of revocation arises, it is a rebuttable one, and that it has in this case been rebutted by evidence.

Has, then, this presumption been thus rebutted? The proponent has offered evidence to show alienation of affection between the son and mother, abusive treatment of the mother by the son and expressions by her to others of displeasure with his conduct. They claim to have shown sufficient occasion for the will being drawn as it was, good reason for not changing it, and disposition and opportunity on the part of the son to destroy it. But neither disposition nor opportunity is enough to show that he did destroy it, however interested he might have been to do so, nor is the presumption of

revocation thereby overcome. Collyer v. Collyer, 110 N. Y. 481; Knapp v. Knapp, 10 N. Y. 276; In re Kennedy's will, *New York Law Journal*, December 23, 1899, page 989. Moreover, fraud, especially fraud involving crime, is never to be presumed. Besides if, as proponent has sworn in the injunction suit, he had already obtained from her transfers in his favor of all her real and personal estate, the very making of these transfers is an additional reason for supposing that the will was destroyed by the testatrix *animo revocandi.*

But it is urged that the declarations of the testatrix, during the last few years of her life, in regard to the disposition of her property, show that she treated her will as in force and unrevoked by her. Witnesses testified, for example, to such statements by her as that she had made her will and had remembered them, and that she had carried out her husband's wishes in regard to her estate; but with the exception of Mary Augur Lane, whose testimony does not relate to declarations of the deceased later than 1896, there is no witness whose testimony necessarily connects such declarations with the particular will executed in 1882, and unless the proponent relies on the will of Jacob P. Augur, as an expression of his wishes, there is no testimony to show what his wishes were. Certainly it is difficult to understand how in giving her son ten thousand dollars by her will, Mrs. Augur was carrying out the wishes of her husband, who, by his will, gave him only one hundred dollars. This of itself is enough to indicate that even if Harriet M. Augur was sincere in her declarations, made chiefly to the beneficiaries of the will sought to be established, she may not have been referring at all to the will executed in 1882. But even if she did refer to this will made in 1882, as late as June, 1898, she had ample time to revoke it before her death in August, 1898. As Surrogate Varnum said In re Kennedy, supra, "The mere fact of the execution of a will six or eight weeks before the death of the decedent will not affect the presumption that it was destroyed by him with the intent to revoke it. In many of the cases the interval which elapsed between the date when the will was last seen, or known to be in existence, and the date of the death of the decedent, was much shorter and in some cases only a few days."

In the opinion of this Court the presumption of revocation has not been overcome by the evidence. In other words the proponent has not satisfied the Court, by the testimony offered, that Harriet M. Augur's will, executed in 1882, was in existence at her death, or that it was destroyed without her knowledege or consent before her death.

It is well settled, as claimed in argument by counsel for the contestant, that no evidence of the contents of a lost will should be introduced until after evidence of an exhaustive preliminary search has been offered. This Court is far from being satisfied that such a search was made in this case, yet as no objection was made on that ground when the evidence as to the contents was introduced, I should not deny the application on that ground, without first giving the applicant an opportunity to introduce further evidence on that point, or to complete the search if it was still incomplete, but it is unnecessary to reopen the whole case for the purpose of receiving evidence on this preliminary question, in view of the conclusions arrived at by the Court on more decisive grounds. The application is denied.

LIVINGSTON W. CLEAVELAND, *Judge.*